Supreme Court, U.S.
FILED
MAY 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1426

In The

Supreme Court of the United States

October Term, 1989

MICHAEL ROBERT LAYKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

ROBERT C. MOEST
Counsel of Record
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

1. Two decisions too recent to have been available at the time the petition here was filed demonstrate the Court's vigilance in assuring application of the rule of lenity to federal criminal statutes.

In *Crandon v. United States*, 110 S. Ct. 997 (1990) (Nos. 88-931, 88-938), the Court "granted certiorari to review the Court of Appeals' construction of [an] . . . important statute," and, in its decision filed February 27, 1990, reaffirmed that the rule of lenity requires that "any ambiguity" over a criminal statute's scope "should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent." That is, "[t]o the extent that the language or history of [a criminal statute] . . . is uncertain, this 'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Accord, Hughey v. United States*, 58 U.S.L.W. 4570, 4573 (U.S. May 21, 1990) (No. 89-5691) ("[L]ongstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant . . . ."). Indeed, application of the rule of lenity was of sufficient importance that the Court granted certiorari in *Crandon* to consider the question even though the criminal statute there at issue was being applied in a *civil* case.

As petitioner has noted, Petition for Certiorari at 8 [hereinafter Pet.], the "equity skimming" statute, 12 U.S.C. § 1709-2, is an important law to which federal prosecutors have increasingly frequent resort. It closely resembles in this respect the anti-supplemental pay statute considered in *Crandon*. Also like the statute in *Crandon*, there is little doubt that section 1709-2 is – despite

the government's protestations to the contrary – ambiguous as to a critical element – here, whether proof of knowledge of federal financing is necessary to convict. Certiorari should accordingly be granted to review the Ninth Circuit's determination that no ambiguity exists.

2. The government's contention that the "structure of Section 1709-2 supports" the claim that a defendant need have no notion of federal involvement, *see* Brief in Opposition at 5 [hereinafter Br. Opp.], does not gainsay the inherent ambiguity of the statute on this point. Nor is it an answer that "[t]he reference to federal nexus is part of a separate clause . . . ." *Id.* The statute may well be ungrammatical when it comes to the federal-involvement requirement, but that aside, the fact remains that provision *follows* the overall requirement that the defendant "willfully engage[] in a pattern and practice," and therefore appears to be in pari materia with the "purchasing" provision that precedes it within the first part of the definition of the offense. The government is simply incorrect that the language "admits of only one plausible construction." Br. Opp. 6.

3. Petitioner has noted that "equity skimming" is a new crime that exists only by virtue of this statute. Pet. 10-11. This case – in which any government losses are exclusively attributable to an overall decline in the relevant housing market, a circumstance for which petitioner can hardly be blamed – stands to refute the government's claim that "Section 1709.2 punishes a form of theft involving the appropriation of a third party's money or property for one's own use." Br. Opp. 6. Nothing in the statute requires a showing of "theft" or "appropriation" of another's property. It is thus far removed from the general

understanding of criminal fraud, under which the defendant must "obtain[] from the defrauded person some specified thing of value." *People v. Jordan*, 66 Cal. 10, 4 P. 773, 774 (1884) (citing English and Massachusetts law and a leading textbook writer). The substantive acts included in the law – purchasing properties in default, failing to make mortgage payments, and using rents for owner's own purposes – can easily be, and normally are, entirely innocent incidents of the market's operation that occur every day. It is plain that they need not, and here did not – "intent to defraud" or no – result in the taking of anyone else's property.

4. The rule of lenity is, similarly, not defeated by the claim that the provision is "jurisdictional." Br. Opp. 7. A federal-involvement requirement in general may or may not be a substantive element of a criminal statute; it is not a talisman that renders a serious inquiry into ambiguity unnecessary. *See* Pet. 9-10. Unlike 18 U.S.C. § 371, construed in *United States v. Sorrow*, 732 F.2d 176 (11th Cir. 1984), *quoted in* Br. Opp. 9, in section 1709-2, a willfulness requirement appears specifically to control the element of federal relationship.

5. The government argues that neither *United States v. Nofziger*, 878 F.2d 442 (D.C. Cir.), *cert. denied*, 110 S. Ct. 564 (1989), nor *United States v. Johnson & Towers, Inc.*, 741 F.2d 662 (3d Cir. 1984), conflicts with the decision below because neither "involved the question whether a statute required knowledge of a federal jurisdictional requirement." Br. Opp. 9-10. The government's purported distinction depends on its conclusion that the VA or FHA requirement is no more than jurisdictional. The same might have been said about the "direct and substantial

interest" aspect of 18 U.S.C. § 207(c) considered in *Nofziger*.

In any event, the government does not respond to petitioner's principal point concerning *Nofziger* and *Johnson & Towers*. In finding ambiguity in the sweep of the word "knowingly" in a criminal statute, *Nofziger* and *Johnson & Towers* engaged in a far more careful consideration of the ambiguity created by statutory modifiers than did the court below. *Laykin* conflicts with *Nofziger* and *Johnson & Towers* because *Laykin* engaged in the critical initial inquiry for application of the rule of lenity – whether an ambiguity exists – in a cursory and mechanical manner incompatible with the analysis employed by *Nofziger* and *Johnson*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT C. MOEST
Counsel of Record
DAVID GROSZ
FLEISHMAN, FISHER & MOEST
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 557-1077